

	<p style="text-align: center;">DEPARTMENT OF FAIR EMPLOYMENT & HOUSING Enforcement Division</p> <p style="text-align: center;"><i>HOUSING DIRECTIVE</i></p>	<p>Directive Number</p> <p>H-103r</p>
		<p>Distribution Date</p> <p>05/20/2010</p>

1. **SUBJECT: JULIE WALTZ FIRST AMENDMENT POLICY**
2. **PURPOSE:** To establish intake, investigation and conciliation procedures for housing complaints implicating protected First Amendment activity. It is the policy of the Department of Fair Employment and Housing to not investigate complaints based solely on protected First Amendment activities.
3. **BACKGROUND:** The Department of Fair Employment and Housing (DFEH) adopts the following First Amendment policy. This policy only applies to complaints received by the DFEH when the following three required factors are present. First, the complaint must be a housing complaint. Second, the complaint is not against an owner within the meaning of Government Code section 12927, subdivision (e). Third, the complaint implicates protected First Amendment activity as described by the Ninth Circuit in *White v. Lee* (9th Cir. 2000) 227 F.3d 1214. These protected First Amendment activities include, but are not limited to, writing, distributing, and displaying signs, flyers, and newspapers or articles, engaging in expressive associational activities even if they appear to advocate discriminatory policies or positions, and petitioning the government for redress of grievances (e.g., filing of a lawsuit that is not frivolous, contacting law enforcement and providing the police with information that is not deliberately false, or participating in the political or legislative process). (*Id.* at pp. 1226-1228.) If these three factors are present, then the DFEH will follow the protocol described below.
4. **PROCEDURE:**
 - A. **Intake Process:**

When housing complaints are received by the DFEH, they will be screened to determine if this policy applies. If the

intake consultant determines that the required factors appear to be present, then prior to accepting the complaint for investigation, the consultant will refer the complaint to the District Administrator. If the District Administrator concurs, he/she will report the complaint to the Deputy Director of Housing. If the Deputy Director of Housing concurs that the factors appear to be present, then the Deputy Director will report the complaint to the Chief of Enforcement. If the Chief of Enforcement concurs that all the factors appear to be present, then the Chief of Enforcement will report the complaint to the Chief Counsel or the Chief Counsel's designated Associate Chief Counsel (ACC). After the Chief of Enforcement consults with the Chief Counsel or the Chief Counsel's designated ACC, the Chief Counsel or the Chief Counsel's designated ACC will decide whether these factors are present, and whether or not to accept the complaint for investigation under this policy. If the Chief Counsel or the Chief Counsel's designated ACC accepts the complaint for investigation, then the Chief Counsel or Chief Counsel's designated ACC will draft the complaint. The complaint will only include the specific allegations that are appropriately subject to the DFEH investigation under this policy.

B. Legal Advice by the DFEH Legal Division on the Investigation

If the Chief Counsel or the Chief Counsel's designated ACC decides to accept the complaint for investigation, then legal advice will be provided regarding the proper scope of the investigation. The legal advice will include the following three topics:

- 1.) Scope of Investigation: The investigation should be limited in a manner that will permit the DFEH to properly investigate the complaint, but not violate the respondent's First Amendment rights. When advising the Chief of Enforcement, the Chief Counsel or the Chief Counsel's designated ACC will provide guidance on how the specific allegations in the complaint will be investigated. The investigation will not be overbroad, but instead will focus on the specific allegations that were approved for an investigation under this policy. In providing this guidance, the Chief Counsel or the Chief Counsel's designated ACC will be mindful that activities such as distributing flyers and newsletters, lobbying public officials, and petitioning the government are protected by the First Amendment. On the other hand, acts of

violence, threats, or intimidation may constitute unlawful housing discrimination that is not protected by the First Amendment. The investigation will focus on the specific allegations that might prove a FEHA violation.

- 2.) Communications: The Chief Counsel or the Chief Counsel's designated ACC will advise that when communicating with the respondent, media, or public regarding an investigation under this policy, the DFEH representatives will make clear that protected First Amendment activities do not, by themselves, constitute a violation of the FEHA.
- 3.) Length of Investigation: The Chief Counsel or the Chief Counsel's designated ACC will advise on the proper length of the investigation. The DFEH will strive to complete investigations under this policy within 100 days. Any investigation under this policy will be completed as expeditiously as possible, and may not exceed 100 days without the express approval of either the Chief Counsel or the Chief Counsel's designated ACC. Under no circumstances may an investigation under this policy exceed 180 days.

C. Ongoing Monitoring of Investigation by the DFEH Legal Division

If the Chief Counsel or Chief Counsel's designated ACC approves of an investigation under this policy, the investigation will remain under the monitoring of the DFEH Legal Division. To conduct this monitoring the Chief Counsel or Chief Counsel's designated ACC will assign a DFEH staff counsel to monitor the investigation. The monitoring staff counsel will perform the following tasks:

- 1.) Case Review Every Thirty Days: At least once every thirty days the assigned staff counsel and assigned consultant will discuss the status of the investigation. Topics to discuss will include the proper scope of the investigation, and whether the investigation will be completed within 100 days.
- 2.) Formal Discovery: The assigned staff counsel is responsible for reviewing and approving any written discovery (subpoenas, request for production of documents, interrogatories) to insure that the written discovery requests are not overbroad, and that the requests are limited to the allegations that have been approved for investigation by the Chief Counsel or the Chief Counsel's designated ACC.

- 3.) Settlement/Conciliation: Any settlement discussions or conciliation attempts in an investigation under this policy will be conducted by the assigned staff counsel. During any such settlement discussions or conciliation attempts, the staff counsel will take special care to insure that the respondent is not asked to sacrifice any protected First Amendment activity to settle the action or end the investigation. Additionally, staff counsel are advised not to discuss protected First Amendment activity in the context of any settlement or conciliation efforts.

5. **APPROVAL:**

A handwritten signature in black ink, appearing to read 'Phyllis W. Cheng', with a long horizontal stroke extending to the right.

Phyllis W. Cheng, Director

May 10, 2010

Date